recent Michigan case, the indorser actually pays, since the transaction is then executed, the difficulty as to consideration drops out, and the indorser has no redress against the loser. *Rogers* v. *Detroit Savings Bank*, 110 N. W. Rep. 74. If, however, the indorser paid in ignorance of the facts, a court would doubtless reach the opposite result. The merit of the loser in such a case could hardly be said to be equal to that of the indorser, and therefore the doctrine of prior equities would have no application.

WHETHER A POWER TO SELL INCLUDES A POWER TO MORTGAGE. — Whether a power of sale be given to an agent, mortgagee, trustee, executor, or life tenant, the factor determining the extent of the power conferred should in all cases be the intent of the donor. If no absolute intent appears on the face of the power, the presumption may vary according to the character of the estate created, the purposes of the power, and the status of the donee.[1] If the donor retains an interest in the proceeds of the authorized sale, the fair presumption is that the estate was intended to be converted absolutely, and on this ground neither a power of attorney to an agent to sell nor a power of sale mortgage will authorize a mortgage or other encumbrance on the estate.[2] When land is conveyed or devised to trustees or executors, the old English rule that a mortgage, being a conditional sale, was impliedly authorized,[3] has been modified,[4] so that now the generally accepted rule is that in such cases a power of sale authorizes a mortgage only when the purpose is to pay off debts or charges on the land, or to raise a specific fund:[5] if the intention of the settlor or testator can be fulfilled as well or better by a mortgage, the mortgage is authorized. The presumption in favor of an actual sale seems justified; for the obvious expectation was that the *cestui* or estate should receive an adequate price for the land, and this may be defeated if a mortgage is given and foreclosed. If the trustee is to re-invest the proceeds of the sale on similar trusts, it is well settled that a mortgage is a breach of duty;[6] and although in some cases a mortgage may be for the benefit of the *cestui*, the courts have applied the rule strictly. If an absolute power of sale in fee is given to a life tenant, there can be no valid objection to a mortgage; the tenant has all the beneficial interest in the power and should have sole control over the exercise and interpretation of it.[7] The remainderman should not be heard to object that he receives an encumbered estate instead of none at all. But if the tenant is to take only a life interest in the proceeds of the sale, then the injury to the remainderman should be decisive;[2] for a vested remainder in an unencumbered estate should not without his consent be turned into a mere equity of redemption. The fiduciary situation of the life tenant in regard to the proceeds should be sufficient to invalidate a mortgage.

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1 See McMillan *v.* Cox, 109 Ga. 42, 49.
2 See Bloomer *v.* Waldron, 3 Hill (N. Y.) 361, 367.
3 See Mills *v.* Banks, 3 P. Wms. 1, 9.
4 See cases collected in Lewin, Trusts, 11 ed., 497.
5 Loebenthal *v.* Raleigh, 36 N. J. Eq. 169; Stroughill *v.* Anstey, 1 De G. M. & G. 634. See 19 HARV. L. REV. 64.
6 Patapsco Guano Co. *v.* Morrison, 2 Woods (U. S.) 395. See First Nat'l Bank *v.* Nat'l Broadway Bank, 156 N. Y. 459, 471. But *cf. In re* Lueft, 109 N. W. Rep. 652 (Wis.).
7 Kent *v.* Morrison, 153 Mass. 137.

The exception in favor of a purchase-money mortgage given to the settlor at the time of the conveyance is not in conflict with these principles. It may be justified either on the ground that the donor of the power has expressly authorized the mortgage by accepting it, or by the rule that the conveyance and mortgage should be construed as one instrument, and that therefore only an equity of redemption was in fact conveyed.[8] Accordingly, a recent Maryland case held that when land was settled in trust for A for life, remainder over, with a power in A to convey the fee and to invest the proceeds on similar trusts, a purchase-money mortgage made by A to the settlor was good, although a second mortgage given by A to the assignees of the first mortgage was invalid. *Stump* v. *Warfield*, 65 Atl. Rep. 346. It seems settled that a power of sale does not include the right to exchange,[9] partition,[10] contract to sell on credit,[11] or transfer gratuitously;[12] and following these analogies a power of sale should be construed strictly so as to make a mortgage valid only when exceptional circumstances indicate an implied authority.

RECENT CASES.

ANIMALS — TRESPASS ON REALTY BY ANIMALS — STRAYING FROM HIGHWAY. — The defendant's cattle, while being driven along a public highway, escaped without negligence on the part of the driver and went upon the adjoining unfenced lands of B, over which they passed to the unfenced lands of the plaintiff. *Held*, that the plaintiff may recover for the trespass. *Wood* v. *Snider*, 187 N. Y. 28.

At common law the owner of cattle was bound to keep them from straying on another's land, whether that land was fenced or not. *Tonawanda R. R. Co.* v. *Munger*, 5 Den. (N. Y.) 255. This strict rule has been modified in the case of land adjoining a highway, when the driver of the cattle is not negligent. *Tillett* v. *Ward*, 10 Q. B. D. 17; *Hartford* v. *Brady*, 114 Mass. 466. A possible explanation of the exception is that, since the owner of the cattle is unable to fence against straying, the law casts the burden upon the adjoining owner. The purpose of a fence is to restrain cattle from straying rather than to prevent trespassing by those of the adjoining owner. See *Hurd* v. *Rutland & B. R. R. Co.*, 25 Vt. 116. The highway exception, however, only applies when the cattle are rightfully on the highway. *Mills* v. *Stark*, 4 N. H. 512. It would therefore follow that the exception should not be extended to a remote owner, for, as the cattle are not rightfully on the adjoining owner's land but there only with a justification, their further trespass on the lands of the remote owner is not excused by the want of a fence. See *Lord* v. *Wormwood*, 29 Me. 282.

BANKRUPTCY — DISCHARGE — PARTNER'S LIABILITY BARRED BY INDIVIDUAL DISCHARGE. —The defendant had been discharged in voluntary individual bankruptcy proceedings, his schedule including a debt to the plaintiff, who was properly notified. No mention was made in the petition, schedule, or discharge, of firm liabilities. *Held*, that, conceding the debt to the plaintiff to be a firm obligation, the defendant's liability on it was discharged by the individual discharge, whether there were any firm assets or not. *New York Institu-*

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8 Coutant *v.* Servoss, 3 Barb. (N. Y.) 128. *Cf.* Boies *v.* Benham, 127 N. Y. 620.
9 See Woodward *v.* Jewell, 140 U. S. 247, 253.
10 *Cf.* Paget *v.* Melcher, 42 N. Y. App. Div. 76.
11 See Repetto *v.* Baylor, 61 N. J. Eq. 501, 506.
12 Stocker *v.* Foster, 178 Mass. 591.